

**Letter of Findings: 04-20130698**  
**Prepaid Wireless Telecommunications Service Charge**  
**For the Years 2010, 2011, and 2012**

**NOTICE:** IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register.

**ISSUES**

**I. Prepaid Wireless Telecommunications Service Charge – Audit Calculation.**

**Authority:** IC § 6-8.1-5-1(b); IC § 6-8.1-5-1(c); IC § 6-8.1-5-4(a); IC § 36-8-16.6-3; IC § 36-8-16.6-5; IC § 36-8-16.6-6; IC § 36-8-16.6-9; IC § 36-8-16.6-11(a); IC § 36-8-16.6-12(a); IC § 36-8-16.6-13; IC § 36-8-16.6-18(a); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer disagrees with an audit assessment of Prepaid Wireless Telecommunication Service Charges.

**STATEMENT OF FACTS**

Taxpayer is an Indiana business which operates a combination gas station, convenience store, and fast-food restaurant.

Taxpayer entered into an agreement with a national petroleum company to sell gasoline at its location.

Taxpayer receives 50 percent of the gross profits received from gasoline sales.

Taxpayer operates a nationally branded fast-food restaurant at its business location.

Taxpayer's convenience store sells tobacco products, groceries, snack foods, beverages, coffee, and general merchandise. The convenience store also sells lottery tickets, money orders along with accepting payments for utility bills. In addition, Taxpayer also sells "phone cards."

The Indiana Department of Revenue ("Department") conducted an audit of Taxpayer's business records and tax returns. The audit resulted in the assessment of additional sales, withholding, individual income, and wireless prepaid card tax.

The Department's audit began in February 2013. Taxpayer was informed on February 22 2013, that the audit would require an opportunity to review Taxpayer's books and records.

On February 26, 2013, Taxpayer was again notified that the audit needed to review Taxpayer's records. During the course of the eight month audit, Taxpayer was repeatedly asked to produce business records and missing tax returns. During the four-hour September 5, 2013, "closing conference" with Taxpayer's representative and one of Taxpayer's owners, the Taxpayer was asked to produce the missing documentation no later than September 6, 2013.

In the absence of the requested records, the Department issued proposed assessments based on the best information available. Taxpayer disagreed with the assessment and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

**I. Prepaid Wireless Telecommunications Service Charge – Audit Calculation.**

**DISCUSSION**

The Department's audit assessed Taxpayer additional Prepaid Wireless Telecommunications Service Charges ("Prepaid Service Charges"). Taxpayer disagrees arguing that the assessment was unwarranted.

Indiana imposes a Prepaid Service Charge on the sale of "wireless communication service." IC § 36-8-16.6-11(a).

IC § 36-8-16.6-6 defines a "prepaid user" as "a user of prepaid wireless telecommunication services who . . . is issued an Indiana telephone number or an Indiana identification number for the service; or purchases prepaid wireless communication service in a retail transaction that is sourced to Indiana (as determined under IC [§] 6-2.5-12-16.)"

A retail sale of wireless communication service is defined as "the purchase of prepaid wireless communication telecommunication service from a seller for any purpose other than resale." IC § 36-8-16.6-9.

The seller of the services is required to collect the Prepaid Service Charge from its customer each time it sells the service. IC § 36-8-16.6-12(a).

The person who buys the service is liable for the Prepaid Service Charge but "a seller is liable to remit to the department all enhanced prepaid wireless charges that the seller collects from consumers . . . including all charges that the seller is considered to collect where the amount of the charge has not been separately stated on an invoice . . . ." IC § 36-8-16.6-13.

The seller is required to pay the Prepaid Service Charges to the Department of Revenue. IC § 36-8-16.6-12(c). Thereafter, the Department is required to deposit the Prepaid Services to "the statewide 911 fund . . . ." IC § 36-8-16.6-5; IC § 36-8-16.6-18(a).

According to the audit report, Taxpayer "did not provide any source sales documents (cash register Z-tapes) for the audit period but did provide a Z-tape for April 2013." In the absence of documentation for all the periods under review, "[P]hone card sales for the audit period were estimated based [on] this one month's data of a category labeled 'phone cards' on the z-tape."

As further explained in the audit report, "[T]he auditor observed a customer purchase three \$5 phone cards for which sales tax nor service fee was charged. This was discussed with Taxpayer and the Taxpayer stated the phone cards in that transaction were long distance phone cards."

The law authorizing the Prepaid Service Charges states, "As used in this chapter 'department' refers to the department of state revenue." IC § 36-8-16.6-3.

The Department is authorized by statute to enforce, audit, and collect the Prepaid Service Charges. IC § 36-8-16.6-6 provides that:

(a) A seller is subject to the same audit and appeal procedures with respect to the collection and remittance of enhanced prepaid wireless charges as with collection and remittance of the state gross retail tax under [IC 6-2.5](#).

(b) An audit under subsection (a) must be conducted jointly by the department of state revenue and the board.

In addition, it should also be noted that the Prepaid Service Charge is included as a "listed tax" under IC § 6-8.1-1-1 because the Department is required to administer and collect this tax.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." *Indiana Dep't of State Revenue v. Rent-A-Center East, Inc.*, 963 N.E.2d 463, 466 (Ind. 2012); *Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue*, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

In the absence of complete records for all phone card sales, the Department's audit assessed tax based on the best information available and is authorized to do so under IC § 6-8.1-5-1(b). The statute authorizes the Department, if it reasonably believes that a taxpayer has not reported the proper amount of tax due, to make a proposed assessment of unpaid tax on the basis of the best information available to the department.

Each taxpayer is required to maintain records sufficient to determine the amount of tax due. IC § 6-8.1-5-4(a) reads as follows:

Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. The records referred to in this subsection include all source documents necessary to determine that tax, including invoices, register tapes, receipts, and canceled checks.

Taxpayer was under an obligation to collect the Prepaid Service Charges from its phone card customers and to retain "books and records" necessary to determine the amount of Service Charges it was required to deposit with the Department. Taxpayer failed to maintain those records and the audit was correct in assessing additional Prepaid Service Charges. Taxpayer has failed to provide any documentation necessary to demonstrate that the assessment was "wrong." Under IC § 6-8.1-5-1(c), Taxpayer's protest must be denied.

#### **FINDING**

Taxpayer's protest is respectfully denied.

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